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In The

Supreme Court of the United States

JAMES OBERGEFELL
and BRITTANI HENRY, et al.,

Petitioners,

v.

RICHARD HODGES, et al.,

Respondents.

[Additional Case Captions Listed On Inside Front Cover]

On Writs Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF *AMICUS CURIAE* OF PROFESSOR DANIEL N. ROBINSON, PH.D. IN SUPPORT OF RESPONDENTS

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APRIL DEBOER, et al.,

Petitioners,

v.

RICHARD SNYDER, et al.,

Respondents.

VALERIA TANCO, et al.,

Petitioners,

v.

WILLIAM EDWARD "BILL" HASLAM, et al.,

Respondents.

GREGORY BOURKE
and TIMOTHY LOVE, et al.,

Petitioners,

v.

STEVE BESHEAR, et al.,

Respondents.

QUESTIONS PRESENTED

1. Does the Fourteenth Amendment require a state to license a marriage between two people of the same sex?

2. Does the Fourteenth Amendment require a state to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state?

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INTEREST OF *AMICUS CURIAE*[1]

The author and *amicus*, Professor Daniel Robinson, Ph.D., has devoted a half-century to scholarly and scientific research and to teaching pertinent to the core issues in this case. Robinson has published over eighteen books, over ninety articles and written chapters in twenty books.[2]

Robinson's credentials qualifying him to render an opinion on the major factual claims in the lower courts are as follows: Member of the philosophy faculty at Oxford University, having taught annually since 1991; Distinguished Research Professor, Emeritus, Georgetown University; Member of the Board of Scholars of the James Madison Program in American Ideals and Institutions, Princeton University; Senior Scholar, Wheatley Institution, Brigham Young University; B.A. in Psychology, Colgate University; M.A. in Experimental Psychology, Hofstra University; and a Ph.D. in Neuropsychology, City University of New York.

From 1971-1997, *amicus* served as a member of the faculty of Georgetown University, where he held

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[1] The parties have consented to the filing of this brief and that consent is on file with the Clerk of the Court. As required by Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part, and no person other than the *amicus* and its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

[2] For a representative list of publications, see http://www.philosophy.ox.ac.uk/members/senior_research_fellows/dan_robinson.

the following positions: Distinguished Research Professor, Professor of Psychology, Adjunct Professor of Philosophy, and Associate Professor of Psychology. Additionally, Robinson was the director of the Graduate Program in Psychology from 1981-1983 and the chair of the Psychology Department from 1973-1976 and from 1985-1991.

Robinson's academic and scholarly contributions also extend to philosophy and to core issues in philosophy of mind, moral philosophy and philosophy of law, having taught these at Oxford University since 1991.

He has written and lectured extensively on the issues germane to the instant case: (a) On determinism, the extent to which significant human actions are voluntary or arise from factors beyond the powers of the person. See (PRAISE AND BLAME: MORAL REALISM AND ITS APPLICATIONS (Princeton 2002)); (b) On the use and abuse of research and theory in the matter of explaining human behavior; (c) On the rise of medical jurisprudence within the context of the history and philosophy of law (WILD BEASTS AND IDLE HUMOURS: THE INSANITY DEFENSE FROM ANTIQUITY TO THE PRESENT (Harvard 1996)); (d) On the ethical dimension of advocacy within professional communities (ETHICS AND ADVOCACY, 39 AMERICAN PSYCHOLOGIST (1984), pp. 787-793.

Over the course of nearly fifty years, Robinson has held visiting appointments at Amherst College, Princeton University, Oxford University, Columbia

University, and the Folger Shakespeare Institute. He has been retained as a consultant by the National Institute of Mental Health, the National Institute of Health, the National Science Foundation, the Public Broadcasting System, the MacArthur Foundation, and the Attorney General's Task Force on Crime. Robinson has sat on the editorial boards of The Journal of the History of Behavioral Sciences, Annals of Theoretical Psychology, Cuadernos Argentinos de Historia de la Psicologia. He served as Series Editor in Psychology for Columbia University Press. Further, he has also served on the Department of Health and Human Services' Special Panel on Fetal Tissue Transplant Research and on the HHS Secretary's Advisory Committee on Genetic Testing.

He was the section co-editor of Physiological Psychology for the 1978 edition of The International Encyclopedia of Neurology, Psychiatry, Psychology, and Psychoanalysis and has contributed article entries to eight other encyclopedias.

He is a Fellow of three Divisions of the American Psychological Association, including the Division of Experimental Psychology. Moreover, he has also been President of two Divisions of the APA: History of Psychology and Theoretical and Philosophical Psychology. Both Divisions have honored him with lifetime achievement awards. In 2011, he received the Joseph B. Gittler Award from the APA for distinguished contributions to the philosophical foundations of Psychology.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Amicus briefs and experts supporting same-sex couples are primarily drawn from psychiatry, psychology and social work in an attempt to validate three main propositions: First, that homosexual couples are indistinguishable from heterosexual couples on the usual and accepted measures of mental health; second, that such couples suffer no deficiency in the dispositions and skills associated with proper parenting; third, that opposition to extending the right to marry to such couples is grounded in the traditional animus against homosexuals, the animus commonly if oddly referred to as *homophobia*. Evidence adduced in defense of these assertions was culled from a range of published research findings, from first-person reports by clinical practitioners, and from testimony by scholars in the field of social and cultural history.

It is entirely unclear how these three main propositions bear on the matter before the Court even if supported by a competent and disinterested appraisal of the relevant literature. No state imposes a test either of mental health or of parental competence as a condition of licensure for marriage. In view of this, the lower Court's decision to *not* tie the outcome to expert opinions supporting the propositions cited above was correct. This brief will discuss the dubious nature of these propositions and the weakness of the alleged material in support.

ARGUMENT

I. THE CONCEPT OF "MENTAL" ILLNESS

The judgment of relevant professional communities in the matter of mental illness has taken dramatic turns both historically and even recently. The 1960s and 1970s witnessed a spate of essays and books addressed to mental health specialists and raising fundamental questions about the ethical dimensions of the therapeutic enterprise. Much of this was at the expense of the so-called "medical model," the emphasis now shifting away from notions of disease and toward environmental and social determinants. Thomas Szasz's *The Myth of Mental Illness* first appeared as an article in the journal *American Psychologist* in 1960, later becoming a best-selling book.[3] The argument advanced by Szasz is that there cannot be a "mental" illness, for "mind" is not an entity of the sort that can become diseased; only bodies have such a fate. Accordingly, whatever psychiatry might have as a realistic aim, it surely could not be the "curing" of a "mental" illness.

Other commentators, including *amicus*, found in the clinical practices of psychology and psychiatry direct challenges to the constitutional rights reserved to citizens.[4] There was growing concern that therapeutic

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[3] Thomas Szasz, "The Myth of Mental Illness." (1960) *American Psychologist*, 15, 113-118.

[4] See Nicholas Kittrie, *The Right to be Different*. (1971) New York: Penguin; Daniel N. Robinson, "Therapies: A clear and present danger." *American Psychologist*, 1973, 28, 129-133.

initiatives designed to help or cure or render persons more "adjusted" had by now encroached upon lawfully permissible variations in perspective and behavior. In the matter of sexual "identity," the emphasis at this time was on cultural and social influences thought to impose gender roles on persons for the good of the whole. As recently as 1999 leading figures in Psychology retained an attachment to such theories which, in the words of Bussey and Bandura, regard "gender conceptions and roles are the product of a broad network of social influences operating interdependently in a variety of societal subsystems."[5] Intrinsic to this entire line of reasoning was the assumption that harmless eccentricities expressed an individuality worthy of respect. Notions of immutability or inevitability were not popular. The reigning school of psychology was Behaviorism whose major tenet was that the sources of behavioral activity are to be found not within the organism but in the surrounding environment. The idea of fixity, of "types," of innate tendencies and hereditary determinism were too close to the ideology of the side that lost WWII. In a word,

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[5] K. Bussey and A. Bandura, "Social cognitive theory of gender development and differentiation." *Psychological Review*, (1999) 106, 676-713. It is worth noting that strong opposition to social-construction theory comes less from biologically oriented specialists than from cognitive theorist. See Carol Lynn Martin, Diane N. Ruble & Joel Szkrybalo "Cognitive Theories of Early Gender Development" Psychological Bulletin 2002, Vol. 128, No. 6, 903-933.

Environmentalism was "correct" and, in many quarters, still is.[6]

The 1960s was also the period hosting the double-helix and a revived interest in the genetic foundations of all biological systems. After a lull, the journals again began to feature research in behavioral genetics, studies of genetics in relation to mental illness, neo-evolutionary theories rich in their social and psychological implications. Yet another round of the Nature-Nurture debate was launched: How much of human psychology is "hard wired" and virtually fixed? How much is malleable and responsive to environmental pressures? A few voices were raised to dampen unwarranted theoretical enthusiasms.[7]

II. PERSPECTIVES ON HOMOSEXUALITY

Within the larger framework of conceptions of mental health and illness, the subject of homosexuality displayed comparable twists and turns in perspective, not excluding direct stimulation of the human brain in attempts to establish a normal heterosexual orientation.[8] Homosexuality presents particularly

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[6] See Daniel N. Robinson, *An Intellectual History of Psychology* (1976) New York: Macmillan.

[7] See, for example, Daniel N. Robinson, "Nature, nurture, and nonsense" *Raritan*, 1984, 4, 120-132.

[8] Moan, C.E. & Heath, R.G., Septal stimulation for the initiation of heterosexual activity in a homosexual male. *Journal of Behavior Therapy and Experimental Psychiatry* 3:23-30 (1972).

daunting difficulties to those seeking to study it in a systematic way or develop theories regarding its essential nature, etiology and development across the lifespan. Research, though extensive, is plagued by problems of definition, description, and measurement. There is no firm and widely endorsed set of observations to identify the population of interest. The relevant literature offers three basic but different criteria for establishing one's sexuality: (a) sexual behavior, (b) sexual attraction, or (c) self-ascribed sexual identity.[9] But within each category distinctions are arguable. How frequently must homosexual behavior occur for participants to qualify as homosexual? What pattern of behavior is necessary or sufficient to be classified as homosexual? Over what period of time must same-sex sexual activity occur to establish homosexuality?

If one's sexual orientation is defined instead by "attraction," one must then distinguish between physical attraction or romantic attraction. In addition, sexual attraction typically exhibits itself along a continuum. Many persons acknowledge some degree of attraction to members of both sexes. If a man identifies himself as a "2" or a "3" on a scale in which "1" represents "only attracted to men" and "7" represents "only attracted to women," is he properly classified as "homosexual" or "straight" or something less definite?

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[9] Edward Laumann, et al., *The Social Organization of Sexuality.* (2000) Chicago: University of Chicago Press.

Perhaps the least ambiguous definition of homosexuality is provided by self-ascriptions. On this account, persons are "gay" or "lesbian" if they say they are, i.e., if they adopt these terms as expressing their sexual identities. Such self-ascriptions, however, are also based on criteria different for different persons and at different times in life. Research by Laumann and his colleagues is suggestive:

> While there is a core group (about 2.4 percent of the total men and about 1.3 percent of the total women) in our survey who define themselves as homosexual or bisexual, have same-gender partners, and express homosexual desires, there are also sizable groups who do not consider themselves to be either homosexual or bisexual but have had adult homosexual experiences or express some degree of desire. . . . This preliminary analysis provides unambiguous evidence that no single number can be used to provide an accurate and valid characterization of the incidence and prevalence of homosexuality in the population at large. In sum, homosexuality is fundamentally a multidimensional phenomenon that has manifold meanings and interpretations, depending on context and purpose.[10]

Consistent with this, a study funded by the National Institute of Health revealed a similar result in a report on lesbian health issues:

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[10] Ibid, pp. 300-301.

> There is no standard definition of lesbian. The term has been used to describe women who have sex with women, either exclusively or in addition to sex with men (i.e., *behavior*); women who self-identify as lesbian (i.e., *identity*); and women whose sexual preference is for women (i.e., *desire* or *attraction*). . . . The committee strongly believes that there is no one "right" way to define who is a lesbian.[11]

On the question of one's "sexual identity," it is important to consider Laumann's finding that only 16% of women and 36% of men who acknowledged some attraction toward members of their own sex actually identified themselves as "homosexual." If Cicero is to be believed, Mark Antony in his youth behaved as if he were *married* to Curio.[12] Here is a fact gleaned from an ancient world, celebrated for its laws, its political power and sophistication, its institutionalized forms of marriage and family life. Surely Mark Antony's "sexual identity" was not that of a homosexual, but just as surely his conduct, at least as a young man, included homosexual acts and affinities.

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[11] Lesbian Health, *Current Assessment and Directions for the Future*, National Academy Press, 1999 at 22-33.

[12] M. Tullius Cicero., *The Orations of Marcus Tullius Cicero*, 2nd Phillipic against Mark Antony, Sec. 44. Literally translated by C. D. Yonge. London. George Bell & Sons. 1903.

As the definitional problems linger, so too does the tendency within professional communities to shift perspectives on homosexuality, often with little or no empirical justification. A snapshot of the transitional attitudes toward homosexuality within the clinical community is seen in Gerald C. Davison's, "Homosexuality: The Ethical Challenge," which was published in 1976.[13] This was two years after homosexuality was removed from the American Psychiatric Association's *Diagnostic and Statistics Manual* (DSM). Davison noted that, successful or not in treating homosexuals desirous of transforming their sexuality, there remains the question of whether what is being treated is a disease in the first place. Perhaps in such cases the therapeutic goal may have more to do with considerations of social acceptability than of mental health.

Note that in 1976 this was taken as a measure of forward thinking, a liberation from Psychiatry's labored "medical model" which regarded any departure from conventional attitudes and behavior as a sign of possible pathology. Davison's 1976 essay might be usefully contrasted with Franz Kallman's 1952 "classic" study of the genetic foundation of homosexuality. Kallman not only reported a high concordance of homosexuality in identical-twin pairs (100% – surely an all-time record!) but related this to the prevailing clinical perspective of the time according to which

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[13] *Journal of Consulting and Clinical Psychology* 1976, Vol. 44, No. 2, 157-162.

such sexual departures from the norm were part of a larger psychodynamic pathology; part of what Kallman soberly classified as "an organically disarranged sex constitution" (p.285).[14]

Two of the legendary theoreticians in psychiatry were scarcely of one mind in this area. Both Havelock Ellis and Sigmund Freud rejected the "disease" theory of homosexuality. Ellis regarded homosexuality as innate and Freud as an expression of the essential bisexuality of human beings.[15]

Here, then, is the well known shift of fashion within the disciplines of psychology and psychiatry where theoreticians pretty much have things their own way. From the 1950s when homosexuality seemed to many specialists to be, "an organically disarranged sex constitution," to 2007 when, in its *amicus* brief, the American Psychological Association would declare matter-of-factly that,

> Homosexuality is neither a disorder nor a disease, but rather a normal variant of human sexual orientation. The vast majority of gay and lesbian individuals lead happy, healthy,

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[14] Franz Kallman, "Comparative twin study on the genetic aspects of male homosexuality" (1952) *The Journal of Nervous and Mental Disease*, vol. 115, pp. 283 ff.

[15] Ellis, H. (1901). *Studies in the psychology of sex: Volume 2: Sexual inversion*. Philadelphia: F.A. Davis, Freud, S. (1905). Three essays on the theory of sexuality. In J. Strachey (Ed. and Trans.), *The standard edition of the complete psychological works of Sigmund Freud* (Vol. 7, pp. 123-245). London: Hogarth Press.

> well-adjusted, and productive lives. Many gay and lesbian people are in a committed same-sex relationship. In their essential psychological respects, these relationships are equivalent to heterosexual relationships.[16]

The half-century separating these conclusions produced no body of fact clearly exposing the older position as defective and the current one as sound. Whatever had inclined the American Psychiatric Association to include homosexuality in earlier editions of the *Diagnostic and Statistics Manual*, and remove it from the later one, it was not a discovery or the result of scientific investigation. It was an altered perspective, culturally fortified and, alas, "politically correct." The earlier professional judgments were beholden to the same factors.

III. THE APA *AMICUS* BRIEF REVISITED

The conclusions advanced in the brief filed by the American Psychological Association warrant scrutiny. The "Table of Authorities" in that brief includes a number of already well-rehearsed documents, rather dated, with at least half of them being position papers, or textbooks or encyclopedia entries. Of the 140 citations, 64 are more than a decade old and fewer than ten address on empirical grounds the question of the mental health of homosexuals in same-sex

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[16] *2006 CA S. Ct.* Briefs 925379; *2007 CA S. Ct.* October 4, 2007.

associations. The research of John Gonsiorek, highlighted in the brief, dates to the 1970s. However, in consulting his 1982 review of the literature, one finds this clearly stated caveat: "One of the initial and major problems in the scientific study of homosexuality is the definition of who is homosexual. This issue remains highly problematic. . . ."[17]

The APA brief cites six publications of Dr. Herek, but most of these are repetitions of each other. Then there is Evelyn Hooker's work, treated as authoritative, but now more than fifty years old. Interestingly, Dr. Hooker begins her "classic" paper by noting that,

> Current psychiatric and psychological opinion about the adjustment of the homosexual may be illustrated by a quotation from a report on homosexuality recently issued by the Group for the Advancement of Psychiatry (1, p. 2): "When such homosexual behavior persists in an adult, it is then a symptom of a severe emotional disorder."

Then, after administering the Rorschach test, she makes clear that the required assumption is that,

> . . . the Rorschach is a valid instrument for determining adjustment in the way in which we have defined it. . . . If so, then clearly there is no inherent connection between pathology

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[17] John Gonsiorek, "An Introduction to Mental Health Issues and Homosexuality" *American Behavioral Scientist* (1982) vol. 25, 367-384.

> and homosexuality. But caution is needed. As clinicians, we are well aware, in daily practice, of the limitations of projective material analyzed "blind." Nevertheless, the quantitative results are striking, and they are confirmed in part by observations of the judges, as well as – and I say this with great caution – by life-history data.

As it happens, any attempt to settle a matter of this sort by looking at Rorschach protocols is jejune and simplistic. For a recent and unforgiving critique of the test, see *What's Wrong with the Rorschach? Science Confronts the Controversial Inkblot Test.*[18]

IV. THE ARGUMENT FROM BIOLOGY

A persistent claim raised in behalf of same-sex marriage is that sexuality is genetically determined and that homosexuality is, therefore, not a *chosen* mode of sexual expression but largely a biological inevitability, not unlike gender and race. The theory or conjecture here is based on the assumption that the neurobiology of sexuality is genetically fixed such that only relentlessly applied environmental (including cultural) pressures can effectively suppress it. Support for such a thesis would ordinarily be in the

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[18] *What's Wrong with the Rorschach? Science Confronts the Controversial Inkblot Test.* James M. Wood, M. Teresa Nezworski, Scott O. Lilienfeld, Howard N. Garb (2003) New York: Jossey-Bass.

form of estimates of the *heritability* h^2 of the behavior.

It is important to note that estimates of heritability do not predict whether a given characteristic is "immutable," but whether the *variability* of its expression within a given sample can be significantly influenced by environmental interventions. The measure of so-called "narrow heritability" (*h2*) is obtained by determining for a specific population the fraction of the overall variation in the expression of a given characteristic that is attributable to genetic variation within that specific population. This is an unavoidably tortured sentence requiring clarification. To wit: Any feature of an individual specimen (plant, animal, human) that is amenable to measurement is part of the *phenotype* of the specimen. The sum of all of the phenotypic features yields everything that is observable in the makeup of the specimen. With human beings, this would include height, weight, eye color, hair color, etc., but would not exclude such features as funds in one's savings account, musical preferences or political affiliations. Note that the phenotypic profile includes whatever is observable in the individual such that it is part of what is used in identifying *that* individual.

The total ensemble of observable features is the *phenotype* of the individual and the full genetic constitution of the organism is the *genotype*. If every observable feature of a person were strictly and totally determined by heredity, then, for every phenotypic

feature, there would be a causally responsible genotypic contribution.

A large enough sample of a given species or a given variety within the species will display phenotypic variation. Consider hypothetically ten thousand randomly chosen adult human beings. Collectively, they will generate a distribution of heights. In 2007 a television program featured a meeting between the world's tallest man and the world's shortest man, their heights being 7'9" and 2'4".[19] If the heights of a large random sample of adults were graphed between these extreme values, the resulting curve would approximate the normal probability function – the "bell-shaped curve." The sum of the total dispersion of heights under this curve provides a measure of the *variance* of the distribution. The *heritability* of height, for this sample, would be the fraction of the overall variance attributable to genetic differences within the sample. Thus, if all members of the sample were known to possess identical genotypes, then any variation in the observed heights would be properly attributed to environmental sources. In this hypothetical case, $h^2=0$, for, in the absence of genetic variation, heredity contributed nothing to the observed variation in heights. On the other hand, if it were somehow possible to provide absolutely identical environments for everyone in the sample, then any observed variation in height would be entirely attributable to

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[19] Fox News on July 14, 2007.

genetic sources, for in this case there would be no environmental variation at all. The conclusion in this instance would be that the value of h^2 is 1.0, all of the variance now assigned to genetic sources.

This, of course, is a gross simplification. Gene-environment interactions are the rule, not the exception, and in most practical applications involving human beings it is not possible to specify, let alone precisely control, features of the environment known to be influential. With respect to such complex and imprecisely specified characteristics as human sexual desires, inclinations and behavior, attempts to establish values of h^2 should be regarded as useless for scientific purposes. (Alas, this has not discouraged repeated attempts. But then there are still those attempting to create perpetual machines or predict commodity prices from the seasonal trajectory of Mars). Note, also, that h^2 is computed for an identified sample, under specific conditions. The resulting value is not automatically generalized to different samples or even to the same sample under altered conditions.

Setting all this aside, the alleged linkage between high values of heritability and the concept of *immutability* must be challenged. A worrisomely common misunderstanding arises from the tendency to regard measures of heritability as equivalent to "inherited." Heritability is a measure of the *variance* displayed by a phenotype, not a measure of the extent to which its presence in the individual case is "inherited." Moreover, a high value of heritability has no

bearing on the extent to which the *average* expression of the characteristic may be influenced by environmental sources. The value of h^2 for eye color in the fruit fly is very nearly 1.0. However, the *average* eye color of a large sample of fruit flies is significantly affected by the altitude at which they develop. Human height displays high values of heritability but average height is known to be influenced significantly by diet. Again, heritability refers to a statistical property of samples, not to an individual case. It neither predicts nor describes the factors that influence the average value of the phenotype in question. Indeed, it is in the very nature of the measure that it is largely divorced from the theoretical constructions one might be inclined to impose on it.

One need not be skeptical about heredity in order to be skeptical about reported values of heritability when applied to extremely complex social, cultural and institutional matters. The co-twin methodology, which is widely employed in attempts to obtain estimates of h^2 is not immune to these problems. Typically, the method includes a study of identical and fraternal twins, reared together and reared apart. The literature here is vast and frequently controversial, especially when supporting theories of racial and gender differences. The better systematic studies report non-trivial values of h^2 across a wide range of psychiatric categories, personality "traits" and

anti-social behavior.[20] Nonetheless, there are special problems associated with the method, beginning with the fact that identical twins are (a) statistically non-representative and (b) are similar physically in ways that tend to an uncertain degree to render their "environments" more similar even when physically separated. Equally problematical are the definitions and criteria used to identify the phenotype. There is a tendency, even within the putatively "objective" context of laboratory research, for an observer's expectations to result in bias, often neither intended nor noticed by the observer. At work here is the so-called "Rosenthal effect," named after Robert Rosenthal. Research inspired by his work continues to support the view that observer's "see" what they expect to see. Told that the rats they have been given in a learning experiment have been bred to be bright (or dull), observers turn in results that match the expectation, though no such selective breeding had taken place.[21]

To what extent this affects clinical classifications remains to be determined in each case. By way of illustration, consider twin research on autism. Studies

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[20] See Kenneth S. Kendler and Carol A. Prescott, *Genes, Environment, and Psychopathology: Understanding the Causes of Psychiatric and Substance Use Disorders*. (2006) London: Guilford Press.

[21] See Rosenthal, R. & Fode, K. (1963). The effect of experimenter bias on performance of the albino rat. *Behavioral Science*, 8, 183-189; Rosenthal, R. & Jacobson, L. (1963). Teachers' expectancies: Determinants of pupils' IQ gains. *Psychological Reports*, 19, 115-118.

reliably report a significant genetic component. In groups of twin pairs, where one member of the pair is autistic, it is found that the other is also about 60% of the time.[22] However, the particular expression of autism is not the same, nor is the degree of it. It is doubtful that in such cases therapeutic outcomes would be the same. According to the Autism Society of America, the condition is the fastest growing developmental defect in the nation, increasing at a rate of some 17% annually.[23] Surely none of this can be accounted for on the basis of some significant *genetic* alteration or "drift" occurring at the same rate! What has changed are methods of detection and the criteria adopted in identifying the condition. Note, then, that the heritability of autism will reflect methodological and definitional nuances, not to mention often unnoticed cultural values and suppositions. The same is assuredly the case with homosexuality.

On the specific question of the heritability of homosexuality, the literature is again controversial and inconsistent, the general methodological limitations now complicated further. Within-family studies of the incidence of homosexuality find correlations computed for persons of different age, with different

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[22] Ronald, A., Happé, F., & Plomin, R. (2005). *The genetic relationship between individual differences in social and nonsocial behaviours characteristic of autism. Developmental Science*, 8, 444-458.

[23] Data can be accessed at: http://www.autism-society.org/site/PageServer?pagename=about_whatis_factsstats.

environmental histories, different early rearing and education, etc. The aim in calculating *h2* is to estimate the degree to which phenotypic features are related to genotypic similarity. As sexual partners, homosexual couples cannot produce offspring. Thus, parent-child correlations are unavailable. In this connection, it is of interest that what is described as the most thorough study on the matter found that only 9% of the sons of homosexual fathers reported being either bisexual or homosexual.[24]

This much acknowledged, any systematic review of the relevant literature will turn up many studies reporting a genetic contribution to one or another feature of homosexuality. There are, it should be noted, studies of comparable rigor that uncover no such relationship[25] and any number of studies in which the estimates of the genetic factor range from weak to strong. Added to this is yet another complication; viz., findings indicating a very strong "potential" for homosexual acts on the part of those who have

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[24] (Bailey JM, Bobrow D, Wolfe M, Mikach S. Sexual orientation of adult sons of gay fathers. *Dev. Psychol.* 1995;31:124-129).

[25] See, for example, E. Eckert, et al., "Homosexuality in monozygotic twins reared apart" *British Journal of Psychiatry* (1986), 148, pp. 421-425; more recently, J. Michael Bailey, Michael P. Dunne & Nicholas G. Martin, "Genetic and Environmental Influences on Sexual Orientation and Its Correlates in an Australian Twin Sample" *Journal of Personality and Social Psychology*, 2000, Vol. 78, No. 3, 524-536; Aldo Poiani, *Animal Homosexuality: A Biosocial Perspective* (2010) Cambridge: Cambridge University Press.

never had homosexual liaisons – a "potential" seemingly genetically influenced.[26] A particularly controversial study appeared in 1993 claiming to identify the actual gene-markers for homosexuality.[27] In addition to sampling defects, the study was also marred by the use of inappropriate statistical analysis which, when corrected by others, resulted in the elimination of the principal finding.[28] Subsequent research, with a considerably larger sample, failed to find any evidence whatever of the alleged marker for homosexuality. The researchers concluded, "our data do not support the presence of a gene of large effect influencing sexual orientation at position XQ28."[29]

If there is a maxim arising from the welter of conjectures it is this: Poor experimental controls

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[26] Pekka Santtila et al., "Potential for homosexual response is prevalent and genetic" *Biological Psychology* 77 (2008) 102-105.

[27] D. H. Hammer, S. Hu, V. L. Magnuson, N. Hu and A. M. Pattatucci, "A linkage between DNA markers on the X-chromosome and male sexual orientation" *Science,* 1993, 261:321.

[28] See Terry McGuire, "Is homosexuality genetic? A critical review and some suggestions," in David Parker, *Sex, Cells, and Same-Sex Desire: The Biology of Sexual Preference*. London: Routledge, 1995.

[29] Rice, R., Anderson, C., Risch, N. & Ebers, G. (1999). Male homosexuality: absence of linkage to microsatellite markers at Xq28. *Science,* 284, pp. 665-667. Dean Hamer answered these criticisms and discrepancies in a later volume of the same journal, concluding from still other studies that, " . . . a meta-analysis of all available DNA linkage data continues to support a modest but significant role of the Xq28 region in male sexual orientation." *Science* 6 August 1999: Vol. 285. no. 5429, p. 803.

encourage loose talk. Studies in this area face unavoidable (and some avoidable) problems associated with sampling and the questionable and inconsistent use of self-reports, questionnaires, telephone interviews, word of mouth. It is not unusual for twins to be located by way of HIV clinics, criminal records, psychiatric facilities, or the readership of homoerotic literature. From one study to the next the criteria adopted to classify participants as homosexual vary, some requiring explicit and repeated acts, others calling for "feelings" or "inclinations" or "attractions" of a certain kind. In frequent use is the Kinsey Scale devised in the 1940s in order to establish sexuality by way of "objective" criteria. Persons choose from the following:

0 Exclusively heterosexual

1 Predominantly heterosexual, only incidentally homosexual

2 Predominantly heterosexual, but more than incidentally homosexual

3 Equally heterosexual and homosexual

4 Predominantly homosexual, but more than incidentally heterosexual

5 Predominantly homosexual, only incidentally heterosexual

6 Exclusively homosexual

Needless to say, yet another scale would be required to assess how "equally," "predominantly," "exclusively" are used by a given subject at a given time.

Statements that lend themselves to different interpretation do not become "objective" merely by putting a numeral in front of them. Self-reports at age 15 might differ significantly from those given five and ten years later. Indeed, subjective criteria adopted in choosing scale-factors might also depend on age. Nor is it clear whether those assigning such numerals (they are, after all, *not* numbers, for they are not quantities) to themselves are basing their self-reports on acts, feelings, tendencies – even ignorance. In light of these limitations it is doubtful that published values of heritability or concordance can be regarded as credible, let alone authoritative. Moreover, the range of values is so great (from values on the order of 0.30 to values on the order of 0.75) as to be useless even for establishing a trend. Even if the higher value is accepted – say $h^2 = 0.7$ – only about half of the observed variance in the chosen sample would be ascribable to genetic sources.[30]

Some of the limitations of earlier studies have been mitigated in recent research on very large samples of twins not drawn from clinical facilities or advertisements in literature targeted to homosexuals. Niklas Langstrom et al. based their findings on the entire Swedish population of identical twins, ages

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[30] For all practical purposes, the fraction of the variance attributable to genetic sources is provided by the square of the obtained value of h^2. Thus, a value of 0.7 squared yields 0.49. In this case, fully half of the overall variance arises from non-genetic ("environmental") sources.

20-47, as identified by national surveys. Their database included over 7,000 men and more than 10,000 women. The measure of sexuality was in the form of self-reports The authors describe the test-instrument as follows:

> The . . . survey included no direct question about self-defined sexual orientation. Actual partnered sexual behavior was assessed with two items: lifetime number of opposite-sex and same-sex individuals, respectively, that the respondent had ever "been sexually together with." We deliberately attempted to use a more gender- and sexual orientation neutral definition rather than "sexual intercourse."[31]

Statistical analysis led to the conclusion that for males approximately 35-40% of the variance was attributable to genetic sources, about twice the value obtained from the female sample. The authors acknowledge that their results, " . . . support the notion that same-sex behavior arises not only from heritable but also from individual specific environmental sources." In other words, there is a gene-environment interaction effect of greater or lesser strength from subject to subject. Clearly the greater sources of variation are non-genetic and that the behavioral

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[31] Niklas Langstrom, Qazi Rahman, Eva Carlstrom and Paul Lichtenstein, "Genetic and Environmental Effects on Same-sex Sexual Behavior: A Population Study of Twins in Sweden." (2008) *Archives of Sex Behavior.*

measures of homosexuality employed here for statistical purposes scarcely match up with any defensible conception of "immutability."

A questionnaire asking persons whether they regard themselves as homosexual or heterosexual does not have the same face-validity[32] as does a measure of the actual incidence of homosexual or heterosexual liaisons over a course of years. In the Swedish study, for example, respondents were not asked about their sexual orientations, but about actual partner-relationships that were sexual in nature. In a more typical and far less ambitious study, King and McDonald acknowledged the methodological limitations associated with a relatively small sample but their work is worth citing because of a conclusion that might safely be generalized across the hundreds of studies devoted to the heritability of psychological phenotypes: "[T]he discordance for sexual orientation in both monozygotic and dizygotic pairs is striking and confirms that genetic factors are an insufficient explanation of the development of sexual orientation."[33]

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[32] The "face validity" of a measure refers to the degree to which the measure appears *on its face* to be tapping the process or condition or ability of interest. For example, if the test used to pick those who will be sprinters on a track team is that of timed-trials in actually running sprints, that test would be said to have high "face" validity.

[33] M. King and E. McDonald, "Homosexuals who are twins: A study of 46 probands." *The British Journal of Psychiatry* 160: 407-409 (1992).

It is abundantly clear from the foregoing that virtually no aspect of "homosexuality" has been shown to be "genetically determined" or *immutable*. The factors that shape and direct one's feelings, inclinations and conduct are numerous, interacting, complex, probably shifting and beyond any reasonable attempt at precise measurement and specification. The sexual attraction one might feel toward another can be terminated by a subtle facial expression or a change in intonation. It would be hazardous to estimate the number of passionate engagements brought to a halt by a barking dog or the ring of a telephone. Pascal declared that the fate of Europe would have been different had Cleopatra's nose been longer. There is little in the human frame that is 'immutable' and, as far as the evidence shows, *nothing* at the level of significant interpersonal relationships, sexual or otherwise.

V. "STIGMATIZING" HOMOSEXUALS

If research is to be a reliable guide, there seems to be at least some clinical basis on which to regard homosexuality as often pathological or disabling. J. M. Bailey, reviewing some of the more systematic and methodologically sound studies, concluded that, "homosexual people are at substantially higher risk for some forms of emotional problems, including suicidality, major depression and anxiety disorder."[34] The

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[34] J. M. Bailey, "Homosexuality and mental illness." *Archives of General Psychiatry* (1999), vol. 56, 883-884.

literature here, however, reports trends and statistical profiles. There are surely homosexual persons who would be judged normal and psychologically well adjusted on all of the scales and tests employed for such assessments. Furthermore, over and against this literature are data and theories suggesting that such psychological disorders as are associated with homosexuality may sometimes arise from its social consequences.[35]

The APA *Amicus* brief addresses this and refers to its own "Resolution on Sexual Orientation and Marriage," a document also available on the internet. Beginning with the second paragraph, that Resolution offers a summary and a rather odd conclusion:

> Lesbian, gay, and bisexual populations have higher rates of stress-related psychiatric disorders (such as those related to anxiety, mood, and substance use) than do heterosexual populations. . . . These differences are not large but are relatively consistent across studies. . . . Within lesbian, gay, and bisexual populations, those who more frequently felt stigmatized or discriminated against because of their sexual orientation, who had to conceal their homosexuality, or who were prevented from affiliating with other lesbian,

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[35] This is the conclusion reached by Gonsiorek. See J.C. Gonsiorek, "The empirical basis for the demise of the illness model of homosexuality" (1991). In J. Gonsiorek & J. Weinrich (Eds.), *Homosexuality: Research implications for public policy* (pp. 115-136). Thousand Oaks, CA: Sage.

> gay, or bisexual individuals tended to report more frequent mental health concerns. . . . Taken together, the evidence clearly supports the position that the social stigma, prejudice, discrimination, and violence associated with not having a heterosexual sexual orientation and the hostile and stressful social environments created hereby adversely affect the psychological, physical, social, and economic well-being of lesbian, gay, and bisexual individuals.

Now, nothing in the data establishes that it is the stigma, prejudice, discrimination and violence that causes "higher rates of stress-related psychiatric disorders." What the data actually show is that there are higher rates of stress-related psychiatric disorders than what is found in heterosexual populations. The cited passage relies heavily on the work of Dr. Ilan Meyer, perhaps the most well known researcher in the area of "minority stress." His 2003 publication, "Prejudice, Social Stress, and Mental Health in Lesbian, Gay, and Bisexual Populations: Conceptual Issues and Research Evidence" is widely cited.[36] Meyer was recently interviewed about his research and about his influential "minority stress theory" in general. Here is a relevant passage from the interview:

> However, regarding the black and Latinos, we found an interesting finding. Again, this is a finding that is not unique to this

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[36] *Psychol Bull*. 2003 September, 129(5): 674-697.

> study so I wouldn't tell you anything that is so unique that I would suspect were it actually valid. So this seems to be valid because it's been shown with other populations in general studies. So blacks and Latinos have more stress, but they don't have more mental disorders. So that's very bewildering, again, from the social stress perspective, because you question whether your theory is correct: if they have more stress and the stress is a cause of disorders – which is what this whole study is about – then how come they don't show more disorders?[37]

One might say (charitably) that these reflections by Dr. Meyer indicate a meandering toward some sort of theory, but that the cloud of "intrigue" is not likely to lift soon. The reasonable conclusion is that these matters are not likely to be conclusively settled by way of clinical research or clinical experience. Put another way, it is doubtful that the issues arising from the fact of homosexuality are properly or even plausibly addressed by the strict methods and perspectives of science.

What is not hypothetical is the incidence of AIDS among sexually active male homosexuals. As stated in the most recent press report by the Centers for Disease Control, "Data, presented at CDC's 2010

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[37] The interview took place on August 17, 2009 and can be accessed on the internet at: http://www.mentalhelp.net/poc/view_doc.php?type=doc&id=29219&w=9&cn=117.

National STD Prevention Conference, finds that the rate of new HIV diagnoses among men who have sex with men (MSM) is more than 44 times that of other men and more than 40 times that of women. . . ."[38]

In addition to disease, violence among male homosexual couples accounts for the third greatest risk to health in that population.[39] Added to other studies, the data leave little doubt but that homosexuality, in its fullest expression, is associated with serious medical and psychological conditions at rates significantly greater than what is found in the heterosexual community. The doctrinaire glossing over of such findings is but a form of advocacy that raises grave ethical questions. No doubt, and to some indeterminate degree, public attitudes toward homosexuality are subject to influences arising from the laws and the institutional practices of a community or nation. When the law punishes and condemns, it "stigmatizes" – and intends to stigmatize. However, reporting the incidence of illness or identifying behavior reliably associated with illness and social deviancy is not an exercise in "stigmatizing" but the responsible mission of a professional community.

Conditions warranting professional attention and care of persons judged to be suffering from a form of

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[38] March 10, 2010 CDC press release.

[39] See L. M. Pedeerman and C. G. Dixon, "Domestic violence between same-sex partners: Implications for counseling." *J. Counseling & Development* (2003) vol. 81; pp. 40-47.

mental illness are entered in various editions of the DSM. The entries are not "stigmata." However, they do mark persons as in need of therapeutic attention. It is important that the basis on which such entries appear in so authoritative a work be sound. In this connection, it is instructive to cite Dr. Richard Green, one of the authorities listed in the APA *Amicus* brief. Dr. Green is cited twice, for he was influential in having homosexuality removed from the DSM. More recently, in his article, "Is Pedophilia a Mental Disorder" he considers the decision to remove homosexuality from the DSM. He writes, "Ludicrously, that decision led to a shotgun marriage between science and democracy. It was put to popular vote – a referendum by the entire APA membership. . . ."[40]

One of the major professional authorities behind the movement to remove homosexuality from the DSM is found judging the very procedure by which it came to be removed as *ludicrous*, but offers no alternative method. Surely one clear sign that a position cannot be adopted on the basis of conclusive scientific evidence is that those in the fullest possession of available evidence can do little more than cast a vote!

Actually, there may have been a less ludicrous but rather more mischievous factor rendering the final outcome inevitable. The President-elect of the American Psychiatric Association in 1973, the year in

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[40] *Archives of Sexual Behavior*, Vol. 31, No. 6, December 2002, pp. 467-471.

which the vote eliminated homosexuality from DSM, was Dr. Spiegel. He came to be consulted in the U.S. and internationally on the issue of sexual deviancy, though this had not been his specialty. Only years later, in an interview granted to the Chicago radio program, *All in the Mind*, was Dr. Spiegel's grandson able to clarify his grandfather's role and motive in the DSM initiative. Portions of the radio transcript include the following:

> To hear my family tell it, it was my grandfather alone who banished those 81 words from the DSM. When I was young the family legend was that my grandfather, president of the American Psychiatric Association, single handedly changed the DSM because he was a big-hearted visionary a man unfettered by prejudice who worked on behalf of the downtrodden. This story was wrong on two counts (a) my grandfather was not president of the American Psychiatric Association in 1973, he was president elect; (b) he didn't single handedly change anything. But never mind because this version of events was discarded anyway. Discarded after the family went on vacation to the Bahamas to celebrate my grandfather's 70th birthday. I remember it well. I also remember my grandfather stepping out from his beach front bungalow on that first day followed by a small well-built man, a man that later during dinner my grandfather introduced to a shocked family as his lover, David. David was the first of a long line of very young men that my grandfather took up with after my grandmother's

> death. It turned out that my grandfather had had gay lovers throughout his life, had even told his wife-to-be that he was homosexual, two weeks before their wedding. And so in 1981 the story that my family told about the definition in the DSM changed dramatically. My grandfather was no longer seen as a purely enlightened visionary but as a closeted homosexual with a very particular agenda.[41]

Lest the stigma-theory move down a one-way street, it should be noted that the cited research on "stigmatizing" tends to "stigmatize" those who do not share attitudes prevalent in the homosexual community. Consider studies by Dr. Herek employing the ATLG Scale ("Attitudes Toward Lesbians and Gay Men Scale"). He has applied it to various groups of people and characterizes his findings thus:[42]

> The ATLG and its subscales are consistently correlated with other theoretically-relevant constructs. Higher scores (more negative attitudes) correlate significantly with high religiosity, lack of contact with gay men and lesbians, adherence to traditional sex-role attitudes, belief in a traditional family ideology, and high levels of dogmatism. . . . In

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[41] The full transcript is available on the internet at: http://www.abc.net.au/rn/allinthemind/stories/2007/1992653.htm.

[42] Herek, G. M. & Gonzalez-Rivera, M. (2006). Attitudes toward homosexuality among U.S. residents of Mexican descent, Journal of Sex Research, 43, 122-135.).

> addition, high ATG scores (more negative attitudes toward gay men) are positively correlated with AIDS-related stigma.

These seemingly "objective" characterizations are transparently stigmatizing. It is not likely that persons would wish to be identified as adhering to a family "ideology" or wish to have their strong commitment to core values regarded as "dogmatism." As for "adherence to traditional sex-role attitudes," one would surely regard "adherence" in such a list to be a negative disposition. "Religiosity," too, can be a stigmatizing term and it surely is in Dr. Herek's contribution to the *Handbook of Prejudice, Stereotyping, and Discrimination.*[43]

Looking past the cluttered pages of statistics and the less than convincing "scales" of attitudes, the entirely unsurprising finding is that persons judging the conditions necessary for social stability and wholesome family life are ill-disposed toward sexual liaisons by persons of the same sex. The importance they attach to marriage may rise to the level of political activism and generate such initiatives as, alas, *Proposition 8*. The only reasonable conclusion warranted by such developments is that citizens have sought legal protection for an institution they judge to be integral to acceptable forms of civic life. That their judgment thus "stigmatizes" the practices thereby ruled out is the inevitable consequence of judgment

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[43] Todd D. Nelson, ed. Psychology Press, 2009.

itself. The umpire's announcement, BALL FOUR!, "stigmatizes" the errant curve ball as outside the strike zone.

VI. "HOMOPHOBIA" vs. CORE VALUES

The term *homophobia* has entered the lexicon and is probably insulated against attempts to ban it. The Greco-Latin roots would suggest a fear (φοβος) of man (*homo*), whereas what is sought is a word that would suggest scorn (περιφρόνηση); thus, retaining *homo,* perhaps the right neologism would have been *homoperiphronestic.* However, adoption of this term is unlikely, so *homophobia* it is.

Same-sex litigants and their supporting *amici* contend that voter initiatives defining marriage as a male/female union were driven by homophobia and grounded in Christian "fundamentalist" precepts. Thus construed, denying same-sex couples the right to marry constituted a blatant intrusion of religious conviction into wide secular space.

It is important to make clear in this connection that any number of cultures, both contemporary and ancient, have had no principled or moral aversion to homosexuality but have nonetheless preserved the traditional institution of marriage. Certain of the ancient Greek *Poleis* included homosexual liaisons as part of the sexual education of young males, but this had no bearing whatever on the institution of

marriage as traditionally understood.[44] Simply put, attitudes toward homosexuality do not permit reliable predictions of attitudes toward the nature, institution and purposes of marriage.

One brief was filed in this case by a group calling themselves "Historians of Marriage." Included in the list of historians was Harvard's Professor Nancy Cott. In the trial court in *Perry v. Schwarzenegger*, 704 F.Supp.2d 921 (N.D. Cal. 2010), Cott was presented as an expert on marriage in the within the context of American history. Her understanding of this history is reflected in a lecture of hers, available on the internet, where she claims that,

> In his chapter on the family, Tocqueville doesn't even mention relations between husbands and wives, or question how or whether democracy affects spousal relationships. The chapter only considers relations between the generations – between father and sons. Wives – women altogether – are invisible, seemingly out of range of democratic influence.[45]

What a shockingly inept representation of Tocqueville's observations of American culture and the place

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[44] Practices and attitudes were not the same in every *polis* in ancient Greece. Regions of Ionia condemned homosexuality, otherwise readily accepted in Thebes and Elea. See Halperin, David M., 1990, *One Hundred Years of Homosexuality: and other essays on Greek love*. New York: Routledge.

[45] A transcript of the lecture is found at: http://www.yale.edu/terc/democracy/media/apr3text.pdf.

of women in it! *Amicus* quotes at length from Chapters 9, 10 and 12, Book III of his classic *Democracy in America*:

> Because women primarily shape the mores of a society, the education of women is of great importance. Women in America are not brought up in naïve ignorance of vices of society; rather they are taught how to deal with them and they allow them to develop good judgment. . . . America takes the institution of marriage very seriously both because of its Puritan roots and because it is an industrial society, in which societal order increases prosperity. Paternal discipline is very lax in America, but marriage imposes many demands on women. As a result, young women are cautious before entering marriage and enter into it with full knowledge of the sacrifices it demands. Having thus been prepared for married life and having entered into it freely, American women show great strength in adversity and great resilience of courage. . . . A European frequently affects to be the slave of woman [but] he never sincerely thinks her his equal. In the United States men seldom compliment women, but they daily show how much they esteem them. They constantly display an entire confidence in the understanding of a wife, and a profound respect for her freedom; they have decided that her mind is just as fitted as that of a man to discover the plain truth, and her heart as firm to embrace it, and they have never sought to place her virtue, any more

than his, under the shelter of prejudice, ignorance, and fear.[46]

These passages are important in making clear how systematically Tocqueville's position has been misrepresented by a scholar who has composed entire books on the subject of the American family. The misrepresentation reflects a persistent and worrisome degree of transparent advocacy presented as objective scholarship. It misleads and distorts.

CONCLUSION

As there is no settled understanding of the nature of homosexuality, no standard with which to assess its presence and degree, no method with which to ascertain its dependence on perspective, there can be no firm scientific position to be taken on how it should be understood within the already cluttered arena of psychiatric theory and practice. Yet supporters of same-sex marriage in the academy seek to reconstruct the most foundational of civic institutions – male/female marriage – using the tools of highly suspect social science and psychiatric propositions. Should this Court place its faith in the hands these

[46] Alexis de Tocqueville, *Democracy in America*. Library of America, 2004.

social architects? We may soon find that the new societal structure has been built on sinking sand.

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Respectfully submitted,

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